Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES J. SELLENS,

Petitioner,

v.

AMERICAN STATES INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. SELLENS
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QUESTIONS PRESENTED

1. Whether it was error for the Kansas Supreme Court to hold that K.S.A. 40-2, 118, Fraudulent Insurance Act, was limited to acts of fraud committed against insurance companies and insurance agents in conflict with the obvious contrary language in the statute, its own previous decisions, and further in conflict with decisions of this court, other federal courts of appeals, and other state supreme courts?

2. Whether K.S.A. 40-2, 118, Fraudulent Insurance Act, found to be limited to acts of fraud committed against insurance companies and insurance agents violates the petitioner's right to equal protection of the laws clause of the fourteenth amendment to the U.S. Constitution?

3. Whether it was error for the Kansas Supreme Court to deny the petitioner's motion to publish the Kansas Appellate Court's unpublished opinion in this case when the petitioner had filed a motion to publish the opinion and cited six valid sets of criteria for publication and when any one of the six sets of criteia would be adequate reason to mandate publication?

4. Whether it was error for the Kansas Supreme Court to fail to require the district court to determine whether facts pled by the petitioner states a claim for relief, not only on the theory which was espoused by the petitioner, but on any possible theory that can be "divined" by the court as instructed in *Noel v. Pizza Hut, Inc.*, 15 Kan. App.2d 225, 231, 805 P.2d 1244 (1991), *rev. denied*, 248 Kan. 996 (1991)?

PARTIES TO THE PROCEEDING

The parties to this case are:

Plaintiff/Petitioner:

Charles J. Sellens
Uwabu Sakae-machi 10-7
Komagane-Shi; Nagano-Ken
399-4115
Japan

Defendant/Respondent:

American States Insurance
Company
500 N. Meridian St.
Indianapolis, IN 46204

During the course of this litigation,
American States Insurance
Company was acquired by:

Safeco Corporation
Safeco Plaza
Seattle, WA 97185

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PETITION FOR A WRIT OF CERTIORARI

Charles J. Sellens of Komagane, Japan respectfully petitions this Court for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The Kansas Court of Appeals' memorandum opinion, the Kansas Supreme Court's denial of the petitioner's petition for review, and the Kansas Supreme Court's denial of the petitioner's motion to publish were not officially published. They are identified in the Kansas Judicial Branch's Case Inquiry System of the Kansas Appellate Courts at case number 90202. The Kansas Supreme Court's denial of the petitioner's petition for review is reprinted in the Appendix, hereto ("App."), at 1a. The Kansas Appellate Court's memorandum opinion is reprinted at App. 3a-8a. The Kansas Supreme Court's denial of the petitioner's motion for publication is reprinted at App. 9a-10a.

JURISDICTION

The Kansas Appellate Court issued an unpublished opinion on March 5, 2004 affirming the Kearny County Court's ruling. The petitioner filed a timely motion for publication of the opinion. The Kansas Supreme Court denied the motion for publication on March 30, 2004. The petitioner filed a timely petition for review of the Kansas Appellate Court's unpublished opinion as a matter of right. The Kansas Supreme Court denied the petition for review on May 26, 2004 without addressing the claim

of review as a matter of right. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The equal protection of the laws clause of the fourteenth amendment to the U.S. Constitution provides that no state can: ". . . . deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Kansas, Bill of Rights, Section 1, speaks to the possession of equal and inalienable natural rights. The Constitution of the State of Kansas, Bill of Rights, Section 2, speaks to equal protection and benefit.

INTRODUCTION

This petition raises the issue of whether Kansas state courts must adhere to the tests and standards established by this Court under the equal protection of the laws clause of the fourteenth amendment to the U.S. Constitution. This amendment succinctly prohibits the State of Kansas from denying the petitioner with equal protection of its laws. Section 1 states:

> ". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The final decisions of the Kansas Supreme Court raises questions, for the first time, under Section XIV of the Constitution of the United States and Articles 1 and 2 of the Constitution of the State of Kansas. The peti-

tioner can not find any precedent in any jurisdiction in which the issue was raised of a state judicial authority denying a party with equal protection of its laws by issuing a dispositive opinion that is in conflict with the language in a special statute and/or a state judicial authority ignoring the checks and balances created by its own state's statutes and its own rules.

If the decision below and its analysis stand, there will always be a class of U.S. citizens who will never be able to avail themselves of their right to equal protection of the laws guaranteed them by the U.S. Constitution.

STATEMENT OF THE CASE

Sellens is a U.S. Citizen but has resided in Japan since 1992. He is the president of International Education Services, Inc. (IES), a Kansas corporation doing substantial business in Japan. In August 1996, IES decided to construct a house in Lakin, Kansas and made an application for general liability insurance at "The Agency" in Lakin, Kansas. Doug Geubelle of "The Agency," placed the insurance with American States Insurance Company, Inc. (ASIC) and gave IES a certificate of insurance, binding coverage, to use for proving liability insurance coverage to the City of Lakin, Kansas. The City of Lakin, Kansas issued IES a Contractor's License and a Building Permit based on the insurance coverage provided by ASIC.

Several days later, ASIC, by one of its underwriters, James Bambick (Bambick), altered the IES insurance application by drawing a line through "International Education Services, Inc." and writing "Charles J. Sellens" on the "DBA" line of the application. ASIC then produced a policy listing Sellens as an insured.

On November 10, 1996 Brian Groth (Groth) had an accident and suffered an injury while standing on scaffolding that broke. On or about November 25, 1997, Groth commenced a lawsuit in Kearny County, Kansas, against IES, Sellens, et al.

Sellens attempted to resolve any potential disputes, yet protect the interests of himself and others, by requesting that ASIC defend and indemnity all parties. ASIC was unwilling to resolve the problems by agreeing to defend and indemnify all parties. Instead, ASIC and ASIC's employees conspired to commit additional fraud and did commit additional fraud by attempting to legitimize their policy. By its area supervisor, Carlos Cauldron, ASIC employed Attorney Richard Marquez (Marquez) to enter the case under pretended authorities of the policy.

Marquez entered the Groth case on or about December 12, 1997, stating in his entry to the Court that he was defending all defendants including IES and Sellens. On or about December 24, 1997 Sellens learned of the existence of Marquez and called him on the phone. Sellens refused the ASIC offer of a defense under the proposed conditions and informed Marquez that he had not been served. Marquez informed Sellens that service was not an issue because Marquez had already entered the case. Marquez also stated that he was acting under authority granted by ASIC's reservation of rights in the policy. Marquez gave ASIC information obtained from Sellens to give ASIC additional advantages in its controversy with Sellens.

ASIC deceived proper authorities into believing the policy was legitimate and their acts were lawful. ASIC further attempted to confuse the issues by stating to proper authorities that ASIC was agreeing to defend all

parties under reservation of rights while maintaining to Sellens that ASIC was offering a defense to only Sellens. ASIC gave instructions to Marquez to proceed in ways that would be helpful to ASIC but harmful to Sellens and others.

Many ASIC supervisory employees sanctioned and participated in the violation of K.S.A. 40-2, 118 and other fraudulent acts. On or about August 25, 1998, ASIC filed a Petition For Declaratory Relief in the Kearny County District Court, Case No. 98 C 13, asking the Court to determine the status of IES. However, ASIC failed to name Sellens as a defendant and failed to accurately identify the issues that needed to be brought before the Court.

Sellens sustained substantial financial losses as a result of fraudulent acts committed by ASIC. He filed his own petition requesting that ASIC be found to have violated K.S.A. 40-2, 118 and that it be ordered to make restitution to Sellens of such violations of K.S.A. 40-2, 118 pursuant to the statute.

This statement of the case has been accurately reproduced from Sellens' petition (R.O.A. Vol. 1, pgs. 3 - 7). Kansas' precedent cases including *Bruggeman* and *Grindsted* grant the petitioner's description of events, the status of those which occurred. *Bruggeman v. Schimke*, 239 Kan. 245, 247, 718 P.2d 635 (1986); (Cited in *Grinsted Products v. Kansas Corp.*, 937 P.2d 1 Kan. (1997).

On December 15, 1999, ASIC filed a motion to dismiss case number 99 C 20 asserting that the petitioner had no cause of action. (Vol. 1, p. 10-13). Over three years later, the trial court ruled that the protection provided by K.S.A. 40-2, 118 was limited to acts of fraud com-

mitted against insurance companies and insurance agents. (R.O.A. Vol. I, p. 101-103).

The Kansas Appellate Court agreed. It issued an unpublished opinion that K.S.A. 40-2, 118 is intended to criminalize fraudulent acts committed against insurers and their agents. The Kansas Appellate Court further agreed with the trial court that the intended statutory victim is the insurer – not the insured. App. 6a. The Kansas Supreme Court denied Sellens' petition for review. App. 1a.

REASONS FOR GRANTING THE WRIT

I.

BECAUSE THIS COURT IN *CRUIKSHANK* ARTICULATED A GUARANTY AGAINST THE EXERTION OF ARBITRARY AND TYRANNICAL POWER ON THE PART OF THE GOVERNMENT AND LEGISLATURE OF THE STATE, KANSAS COURTS MUST ALSO BE DIRECTED THAT THERE IS A GUARANTY AGAINST THE EXERTION OF ARBITRARY AND TYRANNICAL POWER ON THE PART OF THE COURTS OF THE STATE OF KANSAS.

This petition focuses on the Kansas Judicial System's interpretation of K.S.A. 40-2,118 (1), Fraudulent Insurance Act, which reads in part:

> "For purposes of this act a 'fraudulent insurance act' means an act committed by any person who, knowingly and with intent to defraud, presents, causes to be presented or prepares with knowledge or belief that it will be presented to or by an insurer, purported insurer, broker or any agent thereof, any written statement as part of, or in support of, an application for the issuance of, or the rating of an insurance policy for personal or commercial insurance. . . ."

The petitioner has consistently maintained, and continues to maintain, that the statutory language in K.S.A. 40-2, 118 specifically instructs that an insured may maintain an action against an insurer for the insurer's fraudulent acts. The Kansas legislature knowingly included the language: "to or by an insurer, purported insurer, broker or any agent thereof," when identifying the entities whose acts are subject to scrutiny under standards imposed by K.S.A. 40-2, 118, Fraudulent Insurance Act.

Precedent Kansas case *Boatright* instructs: "The legislature is presumed to understand the meaning of the words it uses and the procedures it establishes." *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 245, 834 P.2d 368 (1992).

The alteration of the insurance contract previously issued to IES to substitute the petitioner as a named insured is indisputably a fraudulent act committed by ASIC et al. The petitioner indisputably suffered financial damages as a consequence of being identified as a named insured on the insurance contract. The onus was on the Kansas Judicial System to offer more than dismissive language to explain why the petitioner had no cause of action considering the outrage of ASIC's acts and the contradictory language included in the statute.

On point, the U.S. Supreme Court has often defined words to help explain the logic for its decisions. *Hartford Fire Insurance Co. et al. v. California et al. Merrett Underwriting Agency Management Limited et al.*, Nos. 91-1111 and 91-1128 (1993) includes the Oxford English Dictionary's 468 (2d ed. 1989) definition of the word: "boycott." In *Johnson v. United States*, (99-5153), 529 U.S. 694 (2000), 181 F.3d 105, the U.S. Supreme Court discusses the definition of: "revoke." *Bray v. Alexandria*

Clinic, 506 U.S. 263 (1993), includes Webster's Second International Dictionary 1306 (1954) definition of the word: "invidious."

The U.S. Supreme Court placed emphasis on the key word "in" and would not violate the ordinary meaning in *Dunn v. Commodity Futures Trading Commission* (95-1181), 519 U.S. 465 (1997). The U.S. Supreme Court identified "used" in *Jones v. United States* (99-5739), 529 U.S. 848 (2000). In this case, the Kansas Appellate Court' opinion includes:

> "K.S.A. 40-2, 118 is clear in its design to criminalize fraudulent acts committed against insurers and their agents. We agree with the district court that the intended statutory victim is the insurer – not the insured." (App. 6a).

Common sense and the ordinary meaning of the language used do not support the Appellate Court's opinion. To position itself to arrive at its opinion, the Appellate Court had to ignore the identifying language, ". . . .to or by an insurer, purported insurer, broker or any agent thereof. . . ." that is included in K.S.A. 40-2, 118.

The Appellate Court also had to transpose: "In addition to any other penalty, a person who violates this statute shall be ordered to make restitution to the insurer *or any other person or entity for any financial loss sustained as a result of such violation . . . .*" (Emphasis added) to read: ". . . Although the act enables an insurer to seek restitution for fraudulent insurance acts, it does not provide that an insured person can bring a civil lawsuit against an insurer to recover restitution" (sic). App. 6a-7a.

Two dictionaries identify: "by" and also "through" and "with" and offer explanations that support the peti-

tioner's interpretation of the Fraudulent Insurance Act. They are:

> "These prepositions indicate the agency or means by which something is accomplished. By usually introduces directly the agent (person) or agency (power); *named by him; struck by lightning.*" Second college Edition, *The American Heritage Dictionary*, Houghton Mifflin Company, Boston 1892 and also the *New College Edition Heritage Illustrated Dictionary*, McGraw-Hill, New York 1975.

However, the Appellate Court trivialized the importance of the obvious construction with the dismissive language that: "Sellens' argument is without merit." (App. 6a). The Appellate Court went on to find that; "Sellens' proposed construction is simply not supported by the statutory language or the obvious legislative intent." App. 6a.

The Appellate Court did not explain why it considered the petitioner's arguments without merit. Notwithstanding, the petitioner's arguments are most meritorious *vis-a-vis* the Appellate Courts' opinion which would grant insurance companies and their agents immunity from either criminal or civil prosecution for violations of the Fraudulent Insurance Act if only they had followed state statutes and their own rules mandating publication of the opinion.

The petitioner has convincingly demonstrated that the proper construction of K.S.A. 40-2, 118, Fraudulent Insurance Act, provides him with a cause of action against ASIC. Equally important, in the construction most favorable to ASIC, the statute is in the very least still susceptible to the construction that he has a cause of action

against ASIC. The petitioner cited *Baker* in his pleading captioned: *Petition For Review,* stating:

> "When statute is susceptible to more than one construction, it should be considered in its entirety and in light of legislative intent; statute should never be construed so as to produce uncertainty, injustice or confusion if it is possible to construe it otherwise." *Baker v. R.D. Andersen Const. Co., Inc.,* Kan.App., 644 P.2d 1354.

The Kansas Appellate Court's opinion produces profound uncertainty, gross injustice, and extreme confusion by excluding the petitioner as a person offered equal protection under the statute.

Also on point and instructive, the U.S. Supreme Court case *Jones* includes:

> ". . . . the guiding principle that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter." *Jones v. United States* (op. cit.).

The Kansas Appellate Court's construction of the statute clearly raises grave and doubtful constitutional questions. If K.S.A. 40-2, 118 does not provide the petitioner with protection that is equal to ASIC et al, then the statute must be found to be unconstitutional as it would be in violation of the equal protection clause of Amendment XIV to the U.S. Constitution. *Jones* and *Baker* provide instruction that the Kansas Courts' duty was to construe K.S.A. 40-2, 118 to provide the petitioner with a cause of action against ASIC under the statute.

If K.S.A. 40-2, 118 is construed to deny the petitioner with a cause of action against ASIC it could just as easily be construed to grant the petitioner with a cause of

action thus be subject to findings of vagueness. In his pleading captioned: *Petition For Review,* the petitioner asserted that he has rights under both the U.S. and Kansas Constitutions to equal protection under the statute. He cited *Capital Services, Inc. v. Dahlinger Pontiac-Cadillac,* 232 Kan. 419, 422, 657 P.2d 36 (1983) and several other Kansas cases that prohibit vague laws.

In *Gentile,* and on point, the U.S. Supreme Court's opinion includes:

> "a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement." *Gentile v. State Bar of Nevada* (89-1836), 501 U.S. 1030 (1991).

Capital Services and *Gentile* provide instruction that the Kansas Courts' duty was to ensure that K.S.A. 40-2, 118 was not subject to scrutiny for vagueness.

Rewis includes instructions that when a choice must be made between two readings of what conduct Congress has made a crime, it is appropriate: ". . . to require that Congress should have spoken in language that is clear and definite." *Rewis v. United States,* 401 U.S. 808, 812. *Rewis* provides direction that if the Kansas legislature had intended to exclude fraud committed by insurance companies and their agents from the provisions of the Fraudulent Insurance Act, then it should have spoken in language that is clear and definite.

However, the Kansas legislature did not speak in clear and definite language excluding insurance companies and insurance agents from civil prosecution for violations of the Fraudulent Insurance Act. If the Kansas Appellate Courts truly had confidence in the validity of the opinion, it would have required that the opinion be published.

With all due respect, the Kansas Appellate Court System's refusal to publish the opinion can only lead reasonable people to conclude that the Kansas Appellate Courts recognize that the opinion is so legally and fundamentally flawed that it could not be granted the status of precedent but was only made to dispose of the petitioner's case without regard to the rule of law.

The petitioner can offer no better support for his position than a criminal complaint filed by the office of the Kansas Insurance Commissioner. On October 29, 2003, Robert C. Clause, Special Assistant Attorney General, Kansas Insurance Department filed charges against an insurance agent, Rhonda Wilder, charging her with violations of K.S.A. 40-2, 118, Fraudulent Insurance Act. In the complaint, Special Assistant Attorney General Clause specifically cites "Fraudulent Insurance Act" seven (7) times and "K.S.A. 40-2, 118" four (4) times.

If the opinion in this case were assigned the stature of precedent, then Wilder could not be found to be in violation of K.S.A. 40-2, 118, Fraudulent Insurance Act. Wilder is identified as an insurance agent and the opinion would exclude insurance agents from prosecution under the act. Furthermore, Wilder is charged with fraud committed against private citizens Fredrick E. Sutton and Ida Mae Sutton. If the opinion in this case were assigned the stature of precedent, Wilder could not be charged with the commission of any crime because the Fraudulent Insurance Act, a special statute that takes precedent over common law and other statutes, would be limited to: ". . . . criminalize fraudulent acts committed against insurers and their agents."

Construction of the Fraudulent Insurance Act to provide the petitioner with a cause of action against ASIC

is necessary to produce certainty, justice and to avoid confusion about the rights of persons who are victims of fraud committed by insurance companies and/or their agents.

II.

THE FINDING – THAT K.S.A. 40-2, 118, FRAUDULENT INSURANCE ACT, IS LIMITED TO ACTS OF FRAUD COMMITTED AGAINST INSURANCE COMPANIES AND INSURANCE AGENTS – IS IN CONFLICT WITH THE OBVIOUS CONTRARY LANGUAGE IN THE STATUTE, PREVIOUS KANSAS DECISIONS, AND IS FURTHER IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER FEDERAL COURTS OF APPEALS, AND OTHER STATE SUPREME COURTS.

United States v. Morrison, et al., No. 99-5 (2001) invites scrutiny of the Appellate Court's opinion under the reading that laws should be uniform throughout the nation. The petitioner can not find any precedent in Kansas, nor in any other state, in which an insurance company and/or its agents have been found to have been granted privileged status, *vis-a-vis* their insureds. The petitioner can cite hundreds of precedent setting Kansas cases in which the courts have properly recognized that insurance companies and/or their agents do not have, nor are deserving of, privilege status. Some include:

Marshel Investments, Inc. v. Cohen, Kan. App., 634 P.2d 123 sets forth the history of well established principle of law that an insurance agent or broker who undertakes to procure insurance for another and thereafter neglects or fails to do so, will be held liable for any damage resulting therefrom.

In a relevant case, *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163 (1973), the action was

against an insurance company and one of its agents for loss resulting from tornado damage to real property. The opinion includes:

> . . . . "In support of this position plaintiff relies upon the well established principle of law that an insurance agent or broker who undertakes to procure insurance for another and thereafter neglects or fails to do so, will be held liable for any damages resulting therefrom."

The petitioner can also cite hundreds of precedent setting cases in other jurisdicions in which the courts have properly recognized that insurance companies and/or their agents do not have, nor are deserving of, privilege status. Some include the Michigan Supreme Court's observation that the tripartite relations among an insurance company, its insured, and legal counsel employed to defend its insured carries:

> ". . . . rife possibilities of conflict which unquestionable runs against the insured, considering that defense counsel and the insure frequently have a long standing, if not collegial, relations." *Atlantic International Insurance Co. v. Bell,* 475 N.W.2d 294 (1991).

In *Tank,* the state of Washington Court included in its opinion:

> "The potential conflict of interest between an insured . . . mandate an even higher standard. An insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith. Failure to satisfy this enhanced obligation may result in liability of the company or retained defense counsel, or both." *Tank v. State Farm Fire & Casualty Co.,* 105 Wash. 2d 381, 715 P.2d 1133 (1986).

Pacific Mutual Life Insurance Co. v. Haslip, et al. includes the opinion that:

> ". . . . Alabama's longstanding common-law rule that an insurer is liable for both compensatory and punitive damages for the intentional fraud of its agent effected within the scope of his employment rationally advances the State's interest in minimizing fraud, since that rule creates a strong financial incentive for vigilance by insurers. (89-1279), 499 U.S. 1 (1991).

More importantly than the petitioner not being able to cite a precedent, no other entity in this litigation has cited any statute or case in which an insurance company, and/or its agents, have been found to have been granted privileged status, *vis-a-vis* their insureds. The petitioner asserts that there is none because any statute that denies an insured equal protection with his/her insurance company and/or agent would be under continuous challenge for being in violation of Amendment XIV to the U.S. Constitution.

Section 1 of Amendment XIV to the U.S. Constitution succinctly prohibits states from denying U.S. citizens with equal protection of its laws. It states:

> ". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

An issue in deciding if there has been a violation of the protection guaranteed by the fourteenth amendment has often been in determining if the act can be attributed to the State. The purpose and effect of the fourteenth

amendment was clearly stated by Mr. Justice Bradley in the case of *U.S. v. Cruikshank*, 1 Woods 316:

> "It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the state. . . ."

Other cases on point include *Virginia v. Rives*, 100 U.S. 313, in which is stated: ". . . . these provisions of the fourteenth amendment have reference to state action exclusively, and not to any action of private individuals." *Lugar* includes: "State action requires both an alleged constitutional deprivation caused by acts taken pursuant to state law and that the allegedly unconstitutional conduct be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937.

Under *Cruikshank*, *Rives* and *Lugar's* guideposts, this case should be neither close nor difficult. K.S.A. 40-2, 118, Fraudulent Insurance Act, is a special statute that has been enacted by the state of Kansas, thus it takes precedent over common law and other statutes. "When a statute conflicts with the common law, the statute controls." Cited in *Taiwo v. Vu*, 822 P.2d 1028 (Kan. 1991), "A special statute relating to particular persons or things takes precedence over general statute." *Stanton v. KCC*, 2 K.A.2d 228, 229, 577 P.2d 1201. If this special statute does not provide the petitioner equal protection with ASIC et al. it is obviously in violation of the equal protection clause of the fourteenth amendment to the U.S. Constitution.

The petitioner does not allege that ASIC et al have violated his fourteenth amendment rights, nor does he allege that the Kansas legislature has passed a law that

would violate his fourteenth amendment rights if properly enforced. The petitioner alleges that it is the Kansas Judicial System itself that has violated his fourteenth amendment rights by improper enforcement. He further alleges that the Kansas Judicial System is governed by provisions of the fourteenth by virtue of it assuming the legislative function of making case law and is further included in the fourteenth amendment's language governing state's prohibited acts.

Additionally, the Constitution of the State of Kansas, Bill of Rights, Section 1, speaks to the possession of equal and inalienable natural rights. The Bill of Rights, Section 2, further speaks to equal protection and benefit. *City of Shawnee, Kan. v. AT&T Corp.* provides guidance that addresses the petitioner's claim of violation of Equal rights under law. *City of Shawnee, Kan. v. AT&T Corp.* states: "Under equal protection clause, all persons similarly situated should be treated alike." 910 F.Supp. 1546 (D. Kan. 1995). Parties to insurance contracts are similarly situated so K.S.A. 40-2, 118 must be construed to treat the petitioner equally with ASIC and its agents.

The unpublished opinion in this case stands alone, not as an error of judgment by the Kansas Judicial System, but as a written record of the Kansas Judicial System exerting arbitrary and tyrannical power. This case is further a record of the Kansas Judicial System's nearly incontestable ability to deprive U.S. citizens under their jurisdiction of their constitutional rights. Only this Court has the power to prevent the continuations of the abuse.

III.

BECAUSE THE RULES ADOPTED BY THE SUPREME COURT OF THE STATE OF KANSAS ACKNOWLEDGE THAT THE LEGAL PROFESSION IS LARGELY SELF-GOVERNING, THIS CASE MUST BE GRANTED A WRIT SO THAT KANSAS COURTS CAN BE DIRECTED TO FOLLOW STATE STATUTES AND THEIR OWN RULES.

The Appellate Court raised constitutional questions, for the first time, when it agreed with the trial court that the intended statutory victim is the insurer – not the insured. The Appellate Court raised additional constitutional questions, for the first time, when it issued its opinion that the Act enables an insurer to seek restitution for fraudulent insurance acts, but that it does not provide that an insured person can bring a civil lawsuit against an insurer to recover restitution (sic).

The petitioner appealed, as a matter of right, from the final decision of the Court of Appeals pursuant to Kan. Ct.R. Anno. 8.03(e)(1) and K.S.A. 60-2101(b) asserting that final decisions of the Appellate Court raised questions, for the first time, under the Constitutions of both the United States and the State of Kansas. The Kansas Supreme Court simply ignored review mandated by Kan. Ct.R. Anno. 8.03(e)(1) and K.S.A. 60-2101(b) and denied the petitioner the review that was his by right. (App. 1a).

When the petitioner was aggravated by the Appellate Court's memorandum opinion, he filed a motion for its publication. He asserted that K.S.A. 60-2106 dictates publication of opinions that decides new questions of law. The unpublished opinion in 03-90202-A addresses issues of first impression by limiting the applicability of K.S.A. 40-2, 118 to criminalize fraudulent acts committed against insurers and their agents. When the

Appellate Court opined that the intended statutory victim is the insurer – not the insured, it clearly decided new questions of law thus making the opinion deserving of publication.

The petitioner also asserted that K.S.A. 60-2106 also dictates publication of opinions that are valuable as precedents. The opinion is the first, and only, opinion concerning the special statute K.S.A. 40-2, 118. As such, it would be extremely valuable as a precedent thus clearly met statutory grounds for publication.

The petitioner cited Kan. Ct.R. Anno. 7.04(a) that, like K.S.A. 60-2106, dictates publication of opinions that establishes new rules of law. The Appellate Court's opinion concluding that K.S.A. 40-2, 118 is a criminal statute that enables an insurer to seek restitution for fraudulent insurance acts but does not provide that an insured person can bring a civil lawsuit against an insurer to recover restitution clearly establishes new rules of law that meets cited grounds for publication.

He also cited Kan. Ct.R. Anno. 7.04(b) that dictates publication of opinions that involves legal issues continuing public interest. The complex, tripartite relationship among (i) statutes, case laws, and regulations obligating purchase of liability insurance; (ii) the multibillion dollar insurance industry itself; and (iii) the insurance industry's command clients, the general public; makes the unpublished opinion a legal issue of profound continuing public interest deserving of publication.

The petitioner also cited Kan. Ct.R. Anno. 7.04(c) that dictates publication of opinions that explains existing law. The Appellate Court's opinion explained existing law established by *Noel v. Pizza Hut, Inc.*, 15 Kan. App.2d 225, 231, 805 P.2d 1244 (1991), rev. denied

248 Kan. 996 (1991). When the appellate court denied the petitioner's claim for relief, not only on theories which were espoused by the petitioner, but on any possible theory that could be "divined" by the court, it effectively explained that the *Noel* precedent could be discretionarily applied by the court.

The petitioner also cited Kan. Ct.R. Anno. 7.04(a) that dictates publication of opinions that modify rules of law. *Russell* instructs: "A court looks to the substance and not to the form of a pleading and judges it by its allegations and not by the title it bears." *Russell v. Bovard,* 113 P.2d 1064, 153 Kansas 729 (1941). See also: *Re: Shirk Estate,* 363 P.2d 461, 188 Kan. 513 (1961). The Appellate Court made modifications in rules of law in the *Russell* and *Shirk* cases with its opinion that the District Court was correct in judging the petitioners' pleading only by the title it bore. This modification of rules of law clearly met the standards set for publication.

The petitioner also cited Kan. Ct.R. Anno. 7.04(d) that dictates publication of opinions that applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of Kansas. The situation of an insurance underwriter altering an insurance application and the situation of an insurance company altering an issued insurance policy to unilaterally substitute one named insured for another, are obviously factual situations significantly different from published opinions in Kansas thus deserving of publication.

The petitioner also cited Kan. Ct.R. Anno. 7.04(e) that dictates publication of opinions that resolve an apparent conflict of authorities. It is quite obvious that

Robert C. Clause, Special Assistant Attorney General, Kansas Insurance Department, does not hold the opinion that the Fraudulent Insurance act is limited to ". . . to criminalize fraudulent acts committed against insurers and their agents." (App. 6a). The publication of this opinion would have resolved the apparent conflict of opinions between and among the office of the Kansas Insurance Commission, the office of the Kansas Attorney General, and the Kansas Judicial System.

The Kansas Supreme Court simply ignored reviewed mandated by Kan. Ct.R. Anno. 7.04(a)(b)(c)(d) and (e) and K.S.A. 60-2106 and summarily denied the petitioner's motion to publish. (App. 9a-10a). Reasonable people can justifiably conclude that the Kansas Judicial System's blatant rejection of state statutes, case laws, and their own rules is habitual. Only this Court can stop these odious practices.

IV.

THIS CASE SHOULD BE NEITHER CLOSE NOR DIFFICULT TO DECIDE. NO FACTS ARE IN DISPUTE BY EITHER PETITIONER OR RESPONDENT. GRANTING THE WRIT WILL CREATE A VEHICLE NECESSARY TO REINSTATE THE RULE OF LAW IN KANSAS.

The record in this case is quite small but the impact of this Court granting the writ will be tremendous. With all due respect, U.S. citizens under the jurisdiction of the laws of the state of Kansas can not be expected to endure the negative effects of dispositive opinions made without regard to the rule of law. Faux opinions that would decide new questions of law; be valuable as precedents; establish new rules of law; involve legal issues continuing public interest; explain existing laws; modify existing laws; apply established rules of law to a factual situa-

tions significantly different from that in published opinions of the courts of Kansas; resolve apparent conflict of authorities yet go unpublished should not be tolerated in the Kansas Judicial System.

With all due respect, reasonable people can logically conclude that the Kansas Judicial System does not believe itself bound by principles generally accepted as rules of law. The Kansas Judicial System's refusal to adhere to state statutes, numerous precedents, and the Kansas Judicial System's own rules can only lead reasonable people to conclude that the Kansas Judicial System is substituting the rule of individual notions for the rule of law.

Reasonable people can only conclude that the Kansas Judicial System's disregard for its obligations under state statutes and its own rules is systemic. This petition should be granted so that this Court can address and rectify the Kansas Appellate Courts' ruling that, if permitted to stand, portends a class of U.S. citizens will never be able to avail themselves of their right to equal protection of the laws guaranteed them by the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition for a Writ of Certiorari to the Supreme Court of Kansas should be granted.

Respectfully submitted,

CHARLES J. SELLENS
Uwabu Sakae-machi 10-7
Komagane-Shi
Nagano-Ken 399-4115
Japan
Phone & Fax:
81-265-82-4417

Petitioner Pro Se.

APPENDIX A

[Filed May 26, 2004]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

SUPREME COURT ORDER
DISTRICT CASE NO. 99C20 KE

CHARLES J. SELLENS PRO SE
UWABU SAKAE-MACHI 10-7
KOMAGANE-SHI NAGANO-KEN
399-4115
JAPAN

Case No. 03-90202-A

CHARLES J. SELLENS,

Appellant,

v.

AMERICAN STATES INSURANCE COMPANY,

Appellee.

You are hereby notified of the following action taken by the Court:

Petition for Review by Charles J. Sellens.

Considered by the Court and denied.

DATE: 05/26/2004.

CAROL G. GREEN
CLERK

APPENDIX B

[NOT DESIGNATED FOR PUBLICATION]

No. 90,202

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS,

CHARLES J. SELLENS,

Appellant,

v.

AMERICAN STATES INSURANCE COMPANY,

Appellee.

MEMORANDUM OPINION

Appeal from Kearny District Court; THOMAS F. RICHARDSON, judge.

Opinion filed March 5, 2004. Affirmed.

Charles J. Sellens, appellant pro se.

Arthur S. Chalmers, of Hite, Fanning & Honeyman, LLP., of Wichita, for appellee.

Before GREENE, P.J., ELLIOT, J., and KNUDSON, S.J.

Per Curiam: Charles J. Sellens sought a declaratory judgment that American States Insurance Company (ASIC) violated provisions of the Fraudulent Insurance Act, K.S.A. 40-2, 118 *et seq.* Sellens appeals from the

district court's decision to grant ASIC's motion to dismiss for failure to state a claim upon which relief can be granted.

We affirm.

Factual and Procedural Overview

Sellens is a U.S. citizen but has resided and worked in Japan since 1992. On October 15, 1999, Sellens filed his pro se petition for declaratory relief against ASIC, claiming that ASIC had altered an application for general liability insurance made in August 1996 by International Education Services, Inc. (IES), a construction company for which Sellens was president. The petition claimed that IES was the sole applicant for the insurance and that ASIC altered the application by listing Sellens individually as the insured, without the knowledge or permission of IES or Sellens. Upon receipt of the policy on December 11, 1996, Sellens confronted his agent regarding the error and requested cancellation of the policy on the ground that it was "not issued as requested." The policy was canceled and the unused premium was returned.

On November 10, 1996, Brian Groth allegedly suffered an injury while working for IES and Sellens, and on November 25, 1997, Groth brought a suit against both IES and Sellens, among others. Sellens made demand for ASIC to defend and indemnify, but advised ASIC that he had not been served. ASIC retained an attorney who entered an appearance on behalf of all defendant, including Sellens. As a result of these actions, Sellens claims that he was damaged by being made a party when he had not and probably would not have been served. Moreover, ASIC ultimately refused to defend or indemnify IES. Finally, the suit resulted in a *lis pendens* on Sellens' model home in Kansas.

Sellens' petition for declaratory relief claimed that ASIC violated K.S.A. 40-2,118 and requested restitution and reimbursement of his legal costs. ASIC responded to the suit with a motion to dismiss for failure to state a claim, suggestion that the statue was not intended to protect insureds and did not create a private cause of action in any event.

On December 26, 2002, the district court filed its memorandum decision dismissing the action for failure to state a claim upon which relief could be granted, reasoning in part:

> "K.S.A. 40-2,118 is a part of the Fraudulent Insurance Act. This Act is intended to criminalize fraud against an insurer and to extend immunity to those who report the fraud. It deals with fraud in applications for insurance, brought in connection with premium ratings, and fraudulent claims. The intended victim in the statutes is the insurer and its agents. The Act further provides for criminal penalties to be assessed to one who perpetrates such fraud against an insurer or an agent. It also provides for restitution for financial losses sustained by the insurer or any other person as a result of fraud against an insurance company. The Act is criminal in nature rather than civil. This Act does not create a private cause of action in favor of the Plaintiff."

Sellens perfected this appeal.

Did the District court Properly Construe K.S.A. 40-2, 118?

Sellens claims that the court erred in construing K.S.A. 40-2, 118 as supporting no private cause of action for an insured under these circumstance. In reviewing the district court's construction of the statute, our review is

unlimited. See *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003).

Sellens claims that the following statutory language allows him to maintain his private cause of action under the statute:

> "For purposes of this act a 'fraudulent insurance act' means an act committed by any person who, knowingly and with intent to defraud, presents, causes to be presented or prepares with knowledge or belief that it will be presented *to or by an insurer, purported insurer, broker or any agent thereof*, any written statement as part of, or in support of, an application for the issuance of, or the rating of an insurance policy for personal or commercial insurance . . . ." (Emphasis added.) K.S.A. 40-2, 118(a).

Sellens alleges that the "to or by an insurer" language specifically contemplates that an insured may maintain an action against an insurer for an insurer's fraudulent acts in altering an application for insurance. Sellens' argument is without merit.

K.S.A. 40-2, 118 is clear in its design to criminalize fraudulent acts committed against insurers and their agents. We agree with the district court that the intended statutory victim is the insurer – not the insured. We decline to construe the act as proscribing fraudulent acts of an insurer; Sellens' proposed construction is simply not supported by the statutory language or the obvious legislative intent.

We also agree with the district court in concluding that K.S.A. 40-2, 118 is a criminal statute. Although the act enables an insurer to seek restitution for fraudulent insurance acts, it does not provide that an insured person can bring a civil lawsuit against an insurer to recover

restitution. We reject Sellens' claims of error by the district court in construing K.S.A. 40-2, 118 and we affirm the district court in this regard.

Did the District Court Err in its Failure to Determine Whether Facts stated in the Petition Would Support a Claim under Any Other Possible Theory?

Sellens next claims that the district court erred in failing to determine whether the facts stated in his petition would entitle him to relief under any other possible legal theory, citing *Keith v. Schiefen-Stockham Insurance Agency, Inc.*, 209 Kan. 537, 540, 498 P.2d 265 (1972). Sellens claims that the facts pled and reasonable inferences therefrom would support relief under both tort and contract theories.

We acknowledge at the outset that in considering a motion to dismiss for failure to state a claim, the district court has a duty to determine whether facts pled by a plaintiff state a claim for relief, not only on the theory which may be espoused by plaintiff, but on any possible theory that can be "divined" by the court. *Noel v. Pizza Hut, Inc.*, 15 Kan. App. 2d 225, 231, 805 P.2d 1244 (1991), *rev. denied* 248 Kan. 996 (1991).

We decline to apply this rule here because: (i) Sellens' initial petition was entitled "Petition for Declaratory Relief" and sought the exclusive remedy of declaratory relief, together with restitution "pursuant to [K.S.A. 40-2, 118]" and legal costs; accordingly, we decline to impose a duty on the court to divine other theories that might support entirely *different* relief (damages) that were never alleged or requested in plaintiff's petition; (ii) in his response to the motion to dismiss, Sellens stated that "he could have failed petitions against Amer-

ican States and the several individual and entities identified in this brief alleging tort damages" but he did not do so because he "wanted to limit litigation"; accordingly, we decline to impose a duty on the court to divine theories that were intentionally omitted by the plaintiff for some perceived strategic advantage; (iii) at the hearing of the motion, Sellens advised the court that he had filed a separate action against ASIC alleging tort and contract claims and seeking damages; although the court suggested that the actions should probably be "combined," Sellens ultimately concurred with the court's suggestion that the motion to dismiss the declaratory judgment action should be decided first; we decline to apply the *Noel* duty where the plaintiff has already split his cause of action, and other theories that might be "divined" by the court are presumably pending in the second action. See *Shelton v. DeWitte*, 271 Kan. 831, 836-37, 26 P.3d 650 (2001).

For these reasons, the district court did not err in failing to determine whether Sellens' petition might state a claim for relief under other theories.

Did the District Court Commit Other Procedural Error?

Sellens' brief on appeal attempts to frame other issues, including some that are simply incomprehensible. Most if not all of the remaining claims relate to minor procedural error. We have examined all such claims of error and conclude that no material procedural error was committed and that Sellens suffered no legal prejudice as a result of these claims of error. We note in conclusion, however, that we share Sellens' consternation over the delays encountered in achieving resolution of this litigation.

Affirmed.

APPENDIX C

[Filed Mar 30 2004]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

SUPREME COURT ORDER 99C20 KE

District Case No.

CHARLES J. SELLENS
UWABU SAKAE-MACHI 10-7
KOMAGANE-SHI NAGANO-KEN
399-4115
JAPAN

PRO SE

CASE NO. 03-90202-AS

CHARLES J. SELLENS,

Appellant,

v.

AMERICAN STATES INSURANCE COMPANY,

Appellee.

You are hereby notified of the following action taken by the Court:

Motion to publish opinion by Charles J. Sellens Pro Se.

Considered by the Court and denied.

Memorandum in Support noted.

Date: 3/30/2004.

CAROL G. GREEN
CLERK